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Supreme Court, U.S.
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October Term, 1985

STATE OF KANSAS,
Plaintiff,

v.

STATE OF COLORADO,
Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT OR ALTERNATIVELY TO COMPEL COMPLIANCE WITH ADMINISTRATIVE INVESTIGATION PURSUANT TO ARTICLE VIII(H) OF THE ARKANSAS RIVER COMPACT

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The plaintiff, State of Kansas, pursuant to Rules 9.6 and 28.1, hereby moves for an order granting plaintiff's motion for leave to file its complaint or, in the alternative, granting injunctive relief and an order compelling the defendant, State of Colorado, to comply with Article VIII(H) of the Arkansas River Compact. In support hereof, Kansas states:

1. The Arkansas River Compact was adopted in 1949 by the states of Colorado and Kansas to resolve existing and future controversies and to equitably apportion the waters of the Arkansas River. The Compact was approved and enacted into federal law by the Act of Congress of May 31, 1949, 63 Stat. 145.

2. Article VIII(H) of the Arkansas River Compact provides that:

> Violation of any of the provisions of this Compact or other actions prejudicial thereto which come to the attention of the Administration shall be promptly investigated by it. When deemed advisable as the result of such investigation, the Administration may report its findings and recommendations to the State official who is charged with the administration of water rights for appropriate action . . ..

3. Article VIII(I) provides that "[f]indings of fact made by the Administration shall not be conclusive in any court or before an agency or tribunal, but shall constitute prima facie evidence of the facts found."

4. Article VIII(D) provides that "[e]ach State shall have but one vote in the Administration and every decision, authorization or other action shall require unanimous vote."

5. Article VIII(D) further provides that "[t]he Administration may, by . . . unanimous vote, refer [any matter within the purview of the Administration] for arbitration . . .."

6. Through the actions of its officers, agents and political subdivisions, the State of Colorado and its water users have materially depleted the usable and available stateline flows of the Arkansas River since the adoption of the Compact.

7. The depletions by Colorado of usable stateline flows in violation of Article IV(D) of the Compact have been caused

primarily by the postcompact construction and operation of Trinidad Dam and Reservoir and Pueblo Dam and Reservoir, both of which are situated above John Martin Dam and Reservoir, the conservation structure just above the stateline upon which the Arkansas River Compact was conceptualized, and the proliferation of unregulated alluvial wells along the Arkansas River, essentially all of which are located above John Martin Dam and Reservoir.

8. All previous attempts by the states of Colorado and Kansas to negotiate, investigate, arbitrate, or settle Kansas' allegations of material depletion of stateline flows have been unsuccessful, terminated by Colorado's negative votes.

9. Following an investigation in 1981 of allegations by the State of Kansas that certain administrative practices in Colorado were violating Article IV(D) by materially depleting the usable water available for use in Kansas, the Compact Administration made findings of fact pursuant to Article VIII(H). The Administration's recommendation that the Colorado State Engineer immediately require the release of 18,290 acre feet of water unlawfully stored was defeated by the State of Colorado through its negative vote on the Resolution of January 4, 1982.

10. Through numerous meetings of representatives of the states during 1982, the State of Kansas sought to have various matters submitted to arbitration pursuant to Article VIII(D). At a special meeting of the Arkansas River Compact Administration on March 25, 1983, Kansas sought to submit to arbitration the matters that had been the subject of the Administration's investigation pursuant to Article VIII(H) in 1981. Exercising its prerogative to vote negatively, the State of Colorado refused to submit the matters to arbitration, maintaining that all questions of law and all questions of mixed fact and law were not conducive to arbitration. *See,*

Thirty-Fifth Annual Report, Arkansas River Compact Administration, 78, 85, 87-88 (1983). At the Administration's meeting of March 28, 1985, Colorado representatives expressed the view that the investigatory jurisdiction of the Administration pursuant to Article VIII(H) parallels the arbitration provision in Article VIII(D).

11. On March 28, 1985, after discussion and negotiation of allegations of Compact violations dating back to July 23, 1951, the Arkansas River Compact Administration formally resolved, "in accordance with Article VIII(H) . . . [to] promptly investigate:

> 1. Whether the waters of the Arkansas River have been or are being materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas under the Compact by:
>
> a. the operation of the Trinidad Dam and Reservoir Project, Colorado,
>
> b. the operation of Pueblo Dam and Reservoir, Colorado, and the winter water storage program on the Arkansas River in Colorado,
>
> c. well development of the waters of the Arkansas River in Colorado, and
>
> d. well development of the waters of the Arkansas River in Kansas;
>
> 2. Whether water released from John Martin Dam and Reservoir has been stored in Lake McKinney, Kansas, rather than being applied promptly to beneficial use, without the prior authorization of the Administration; and
>
> 3. Whether there have been increases in ditch diversion rights from the Arkansas River by Kansas ditches between the Stateline and Garden

> City beyond the rights existing at the time of the execution of the Compact, which increases have occurred without the Administration first making findings of fact that the usable quantity and availability for use of the waters of the Arkansas River to water users in Colorado Water District 67 and Kansas would not be thereby materially depleted or adversely affected."

12. Notwithstanding the resolution of March 28, 1985, to conduct an administrative investigation of the enumerated allegations, Colorado took the position through its negative votes on six other resolutions proposed by Kansas that only the issue of alluvial well depletion was "subject and appropriate to arbitration pursuant to Article VIII(D) of the Arkansas River Compact."

13. Most of Colorado's depletion of usable stateline flows in violation of Article IV(D) results from diversions from unregulated, postcompact alluvial wells. For decades Colorado allowed the proliferation of unregulated wells in the Arkansas Valley, ignoring the adverse effects on surface water users, and refused to address the problem by curtailment and regulation of wells. *See, e.g.*, Hillhouse, "Survey of Colorado Water Law," 47 Denver L. J. 226 (1970); Comment, "Appropriation and Colorado's Ground Water: A Continuing Dilemma?", 40 U. Colo. L. Rev. 133 (1967); Hillhouse, "Ground and Surface Water In An Appropriation State," 20 Rocky Mountain Min. L. Inst. 691 (1975).

14. On October 4, 1985, after avoiding the command of the Administration's Resolution of March 28, 1985, to "promptly investigate . . . well development in Colorado," Colorado refused "at this time, . . . to undertake an investigation into well development in Colorado . . .." Memorandum from J. William McDonald, Colorado's representative on the

Investigation Committee, to the Arkansas River Compact Administration.

15. While Colorado has refused to participate in a prompt, bilateral investigation of depletions caused by well development in Colorado, as required by Article VIII(H), the Colorado legislature has funded and the Colorado water agencies have undertaken a unilateral investigation of the well development, and Colorado refused to make the information compiled for its study available to the Compact Administration.

16. Colorado has refused to consider the investigation of Kansas' allegations of Compact violation in regard to the operation of Trinidad Reservoir and the operation of Pueblo Reservoir.

17. Following an investigation of depletions of stateline flows using an engineering methodology which was mutually agreed could not identify or isolate the causes of indicated depletions, Kansas proposed the continued investigation of all of the allegations enumerated in the Resolution of March 28, 1985, which were to have been promptly investigated pursuant to Article VIII(H). Colorado refused to investigate the allegations and by Resolution of October 8, 1985, agreed to continue the investigation in four limited areas of potential depletion below John Martin Reservoir. Kansas' allegations of depletion in violation of Article IV(D) of the Compact relate almost exclusively to uses of water in Colorado above John Martin Reservoir.

18. On December 10, 1985, the State of Kansas sought for the third time to have Colorado cooperate in an investigation of its allegations as initially agreed to in the Administration's Resolution of March 28, 1985. Kansas moved that the Arkansas River Compact Administration:

> (1) . . . [R]equire the State of Colorado to furnish to the State of Kansas all information,

records and data concerning alluvial well development in the Arkansas River basin, including the number and location of wells, annual quantities and rates of diversion, authorized number of acres irrigated, types and acres of crops irrigated and all other water use data available;

(2) immediately undertake an investigation of the impact of postcompact well development and water use in the State of Colorado on the usable stateline flow of the Arkansas River and on the State of Kansas' equitable apportionment of the waters of the Arkansas River under the Compact;

(3) recommend to the Colorado State Engineer that he terminate all postcompact well uses in the Arkansas River Basin of Colorado during the pendency of the Compact Administration's investigation of postcompact well development;

(4) immediately undertake an investigation of the impact of past rollover of water in Trinidad Reservoir on the usable stateline flow of the Arkansas River and on the State of Kansas' equitable apportionment of the waters of the Arkansas River under the Compact;

(5) require the State of Colorado to adhere to and act in accordance with the Compact Administration's Resolution of July 24, 1951, concerning reregulation, if any, of native waters of the Arkansas River in connection with Colorado's transmountain diversion under the Gunnison-Arkansas River Project; and

(6) require the State of Colorado to provide to the Compact Administration's Investigation Committee its data, calculations and studies regarding use and depletion of its transmountain diversions in the Arkansas River Basin and to cooperate with

> the State of Kansas in quantifying the amount of Colorado's transmountain return flow to the Arkansas River.

Colorado voted negatively, refusing again to investigate Kansas' allegations and precluding the Arkansas River Compact Administration from taking any meaningful action.

19. In light of Colorado's refusal to abide by the Administration's Resolution of March 28, 1985, to investigate Kansas' allegations of Compact violation, this suit was filed on December 16, 1985.

20. Colorado's continuing refusal to cooperate renders the administrative investigation ineffective and purposeless.

21. Compounding the fact that Colorado has rendered the administrative investigation ineffective and purposeless, Article VIII(H) provides only for discretionary recommendations, leaving the State of Kansas' remedy subject to the negative votes of the State of Colorado.

WHEREFORE, the State of Kansas prays:

1) That the Court grant Kansas' motion for leave to file its complaint or, in the alternative, that the Court order the State of Colorado to comply with Article VIII(H) of the Arkansas River Compact and the Arkansas River Compact Administration's Resolution of March 28, 1985, to promptly investigate all of Kansas' allegations of Compact violation;

2) that the Court enjoin all postcompact well uses in the Arkansas River Valley pending the completion of the Administration's investigation within a time certain; and

3) that the Court retain jurisdiction of this action pend-

ing the expeditious completion of the investigation by the Arkansas River Compact Administration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rules 42(5) and 33 of the Supreme Court Rules, I certify that three copies of the foregoing motion were served upon counsel of record on March 3, 1986.

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March 4, 1986

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INTRODUCTION

Colorado has responded to Kansas' motion for leave to file its complaint by explaining that "Kansas has not made a reasonable effort to resolve this matter [administratively]" and by arguing that "Kansas has an adequate means for vindicating its concerns through a pending investigation by the

[Arkansas River Compact] Administration." Colorado's Brief in Opposition at 1. Based on the facts as related by Colorado, Colorado's position clearly comports with the principle that the Court will not entertain an otherwise justiciable action between states when an alternative forum or administrative remedy is available to the plaintiff state. *See, e.g., Massachusetts v. Missouri,* 308 U.S. 1, 19-20 (1939). Colorado, however, has not recited the essential facts, has dissembled those it did recite, and would mislead the Court into a decision to decline jurisdiction. The object of the reply is to relate the relevant facts, to apply them to the principle of administrative exhaustion, to reveal the unctuousness of Colorado's opposition to Kansas' motion for leave to file its complaint, and to support Kansas' alternative motion to compel compliance with the Arkansas River Compact Administration's Resolution of March 28, 1985, made pursuant to Article VIII(H) of the Compact.

STATEMENT OF FACTS

Colorado divides its statement of facts into two parts, those relating to the administrative investigation which was conducted pursuant to the Resolution of March 28, 1985, and "background facts" relating to the history of Colorado's regulation of ground water. With regard to the administrative investigation, Colorado imparts the spurious view that the committee functioned harmoniously since April, 1985, "to determine if there had been any changes in the relationship between streamflows at selected locations in the Arkansas River Basin." Brief in Opposition at 4. Colorado also suggests that Kansas' amendment on July 12, 1985 of the Resolution of March 28, 1985, interrupted the investigatory process and raised new issues. Colorado then explains that "extensive reports" were submitted and that the "Administration expressly authorized the committee to 'continue with its investigation of the matters upon

which the Committee has mutually agreed that further investigation should be undertaken,' " suggesting to the Court that the resolution reaffirmed that the administrative investigation was operating smoothly and it should continue.[1] *Id.*

In contrast to this sanguine picture, Colorado juxtaposes the Kansas Attorney General's announcement that suit would be filed on December 16, 1985, suggesting that his ostensibly maverick actions differ sharply from the prudent course sought to be followed by the Arkansas River Compact Administration.

ADMINISTRATION OF COLORADO WATER LAW

With regard to the "background facts," Colorado explains that the Colorado State Engineer was justified in believing that he had no authority prior to 1965 to regulate ground water diversions and that in 1965 the Colorado legislature acted expeditiously to provide the State Engineer with "clear" authority. Armed with this newfound authority, according to Colorado, the State Engineer promptly set out to curtail the use of alluvial wells along the Arkansas River. Despite the good intentions of the State Engineer, however, the Colorado Supreme Court found his regulatory effort unconstitutional, which motivated immediate action by the legislature to investigate the need for legislation which would accommodate

---

[1] Contrary to Colorado's assertion, the United States' Representative to the Compact Administration did not conclude that Kansas has not followed administrative procedures. Indeed, Colorado takes the language it quotes out of the context of arbitration, not administrative investigation. As to the latter, the United States' Representative stated that "[i]f one state refuses to permit fact finding on a practice deemed by the other state to be the cause of great injury, then the process breaks down at that point. This may be the case here." *See,* Minutes of Annual Meeting of the Arkansas River Compact Administration, December 10, 1985 at 69.